**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 205 of 1999**

**For Approval and Signature:**

## HONOURABLE MR.JUSTICE C.K.BUCH

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | |
| 2 | To be referred to the Reporter or not ? | |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? | |
| 5 | Whether it is to be circulated to the civil judge ? | |

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**BHAGABHAI ROOPSINGHBHAI RATHOD & 1 - Appellant(s)**
**Versus**
**G K NISARATA, NAYAB MAMLATDAR (PURVATHA) & 1 - Opponent(s)**

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**Appearance :**
MR VIJAL P DESAI for Appellant(s) : 1 - 2.
NOTICE SERVED for Opponent(s) : 1,
MS DS PANDIT, LD.APP for Opponent(s) : 2,

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## CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

**Date : 05/10/2007**

**ORAL JUDGMENT**

1. The appellant-orig.convicts have preferred present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 20th February 1999 passed by the learned Special Judge, Panchmahal at Godhra in Summary

Case No.12 of 1998 (ECA), whereby the learned trial Judge has held the appellants guilty for the offence punishable under Section 12(A)(A) of the of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act') for breach of Section 3 of the Act, and sentenced each of them to undergo rigorous imprisonment for one year and a fine of Rs.500/- and in default of making payment of fine to undergo simple imprisonment for one month.

2. The legality and validity of the judgment and order of conviction and sentence under challenge has been assailed on various grounds mentioned in the memo of appeal. However, Shri Vijal Desai, learned counsel appearing for the appellants, has concentrated his arguments mainly on the following two points :

2.1 The first point of submission of Shri Vijal Desai is that the appellants ought not to have been held guilty for the alleged illegal disposal of wheat, rice and sugar to the tune of 325 kgs., 135 kgs. and 6 kgs. respectively because the evidence led by the prosecution is not adequate to link the appellants with the

crime. Out of total 11 ration card-holders only 3 (three) card-holders were examined by the prosecution and all these three have led hazy type of evidence. The learned trial Judge has not considered at all as to what would be the probable legal effect of the oral version qua the entries which were found in the respective ration cards. The say of the said 11 card-holders before the Inspecting Team was that they have not received or taken either quota of wheat or rice from the shop of the appellants. There is no direct allegation that false bills were prepared of these card-holders and the stock was sold in the black-market and there were no entries in 11 ration cards of the respective card-holders. The bare words of these three card-holders i.e. prosecution witnesses, ought not to have been accepted as gospel truth for accepting the case of the prosecution that the aforesaid stock was disposed of otherwise than actual sale to the said card-holders. PW-4-Kalubhai Sevabhai, who has been examined vide Ex.12, cannot be said to have adhered to his original version which was made before the Inspecting

Officer. This witness has said that he is having his ration card of the shop of the appellants and he had taken only sugar. According to him, he has not stated that he was not given “anything”. According to him, he has not taken rice and wheat from the shop. In the cross-examination, he has admitted that the detailed entries were being made in the card at the time of purchase of the material. He has further admitted that he has other members in the family and other family members also sometimes go to the said fair price shop of the appellants to get the material. On such a weak evidence, the appellants could not have been linked with the crime in question and the appellants deserve benefit of doubt.

2.2 The second fold of argument of Shri Vijal Desai is that the other irregularities which were noticed are of very minor nature. On physical verification, the Inspecting Team had found that the stock of wheat was less by 14.450 kgs., meaning thereby, the difference was of even less than 15 kgs. The stock of rice was found less by about 11.500 kgs. and

the stock of sugar was less only by 2 kgs. If the appellants were really indulging in the activity of black-marketing of the said material by putting false entries in the cards of the card-holders, such a negligible difference ought not have been there. The Inspecting Team has not even categorically stated that the appellants were supposed to distribute material to how many card-holders. According to Shri Vijal Desai, the appellants were handling about 1800 to 2000 card-holders and on a close scrutiny, only 11 persons were brought before the Inspecting Team who had undertaken exercise of inspection. So keeping this totality in mind, the learned trial Judge could have given benefit of Probation of Offenders' Act to the appellants. Ultimately, the appellants were the office bearers of a co-operative society. The appellant no.1 was the Manager of the said fair price shop and the appellant no.2 was the Chairman of the co-operative society, which was issued licence to run the fair price shop. Ultimately, the administration of such shop remains with the entire body of the co-operative society and

the Manager serving under such society practically has no voice; even then very limited difference in the stock was found on the day of “surprise checking”. This case, therefore, cannot be said to be a case of gross irregularities. In such a case even no formal prosecution was required to be instituted. The Government is ignoring number of irregularities in hundreds of cases. In that situation, the learned trial Judge at least ought to have granted benefit of Probation of Offenders' Act to the appellants keeping in mind the scheme of Section of the Probation of Offenders' Act.

2.3 Shri Vijal Desai, learned counsel appearing for the appellants, in support of his arguments has also placed reliance to one decision of the Apex Court in the case of ***Harivallabha and another v. State of Madhya Pradesh, reported in (2005) 10 SCC 330***. He has submitted that in this cited decision the accused was given benefit of Section 360 read with Section 361 of Criminal Procedure Code instead of serving substantive sentence. It

would be proper to reproduce the relevant paragraphs of this judgment, which are as under :

> *"3. Learned Counsel appearing on behalf of the appellants submitted that the appellants are first offenders and in the facts and circumstances of the case they should have been dealt with under the provisions of Section 360 of the Code of Criminal Procedure, 1973 (for short "the Code") and the High Court reduced the sentence of imprisonment from three years to three months without recording any reasons, as required under Section 361 of the Code, which lays down that for special reasons to be recorded, a court can refuse to release a person on probation of good conduct under Section 360 of the Code. In our view, in the facts and circumstances of the present case, the appellants should have been dealt with under the provisions of Section 360 of the Code.*
>
> *4. Accordingly, the appeal is allowed*

*in part and while upholding the conviction and sentence of fine awarded to the appellants, sentence of imprisonment awarded against them is set aside and the trial Court is directed to deal with them under the provisions of Section 360 of the Code. The appellants, who are on bail, are discharged from the liability of bail bonds."*

2.4 After reading the entire set of evidence, oral as well as documentary, Shri Vijal Desai, has fairly submitted that he may not press the present appeal qua the recording of conviction even for minor irregularities. However, he has submitted to consider whether the accused can be granted the benefit under the Probation of Offenders' Act i.e. the benefit under Section 4 of the said Act read with Section 361 of the Code of Criminal Procedure, 1973.

2.5 Even, today this Court may think to grant benefit under Section 4 of the Act read with Section 361 of the Code of Criminal Procedure, 1973, because after laps of about 8 (eight)

years the appellants may not be asked to go to prison to serve the substantive sentence. It is true that in the Statute minimum sentence is prescribed but there is no bar in granting benefit under Section 4 of the Act read with Section 361 of the Code of Criminal Procedure, 1973. In support of this contention, Shri Vijal Desai has relied upon the decision of this Court in case of ***(The) State of Gujarat Vs. Ganpatbhai Premjibhai Joshi, reported in 1998 (2) G.L.H. 787***. The paragraph no.6 of the said decision states as under :

> *"6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation in relation to the offences under Essential Commodities Act, obviously, the decision taken by the*

*Ld. Spl. Judge cannot be said to be, in any manner, wrong."*

3. Ms.D.S. Pandit, learned Additional Public Prosecutor, submits that the finding of the learned trial Judge is absolutely legal and the appellants have been rightly held guilty but in view of the minor difference found during surprise checking, the learned trial Judge could have given benefit of the Probation of Offender' Act to the appellants, especially when they themselves were not traders and the shop was managed by the co-operative society.

4. This Court has considered various aspects. When this Court has observed earlier that minimum punishment by itself would not be a bar in giving benefit of probation, this Court is inclined to exercise discretion in favour of the appellants because sentencing the appellants and asking them to go in jail after lapse of about 8 years would be too harsh when the punishment imposed by the trial Court is only one year. In the offences of moral turpitude or heinous crime, the approach of

the court should be of some deterrence.

5. Similar view was taken by the Punjab and Haryana High Court in case of ***Joginder Singh Vs. the State of Punjab, reported in 1980 CRI. L.J. 1218,*** wherein it has been observed as under :

> *".... though the sentencing process is an integral part of the trial, this would not in any way affect the issue of the applicability of Section 360 and 361 of the Criminal Procedure Code, 1973 to the sentencing process. Therefore, even though a special act may provide the sentence for offence whether fixing a minimum therefor or otherwise, this would be no reason for saying that these provisions of the Code would be excluded or be inapplicable.*

6. The Rajasthan High Court in case of ***Jatan Singh Vs. State of Rajasthan reported in 1995 (3) Crimes 773,*** where Police had recovered 12 bore country made pistol and the accused was

convicted under Section 25 (IB) (a) of the Arms Act, also approved grant of such benefit under the provisions of Probation of Offenders Act. Of course, the accused had remained in jail for one and half months. In the said decision the Court while granting the advantage of Probation has observed as under:

> *"I have given my thoughtful consideration to the rival contentions. The Arms Act, 1959 does not exclude the application of provisions of Section 360, Cr.P.C. as well as those of provisions under Probation of Offenders Act, 1959. In Jugta Ram vs. State of Rajasthan it has been held that unless any Act excludes the applicability of Section 360 of Criminal Procedure Code or the provision of Probation of Offenders Act, the mere fact that a minimum sentence has been prescribed for any offence, is not sufficient to refuse beneficiary probation. It was further observed that its application, however, depends on the facts of each case as to whether such benefit should*

*be extended to the accused or not. This is trite law that mere prescribing of minimum sentence for a particular offence does not create any bar for extending the benefit of probation, either under Section 360 of Criminal Procedure Code or under the Probation of Offenders Act in a particular case. A similar view has been taken in Pidar Singh Vs. State of Rajasthan."*

7. The Court is of the view that this is a fit case where the ratio of the aforesaid decisions would help the appellants-accused. Even the learned trial Judge could have given benefit of Probation of Offenders' Act instead of imposing minimum punishment to the appellants. This is not a case of gross illegalities or misappropriation of food grains allotted to the fair price shop dealers to help the poor people, otherwise huge difference could have been noticed during the surprise checking. A co-operative society if is asked to manage about 2000 card-holders, the officer who had decided to prosecute both

these appellants also should think that in past two months, what was the quantity of stock drawn by the said Society from the Government godown. So the present appeal is required to be allowed and the present appellants are required to be exonerated from the grave charge of disposal of the said food grains i.e. so far as the allegation of disposal of stock of wheat, rice and sugar as mentioned in paragraph no.1 of this judgment is concerned for want of cogent and convincing evidence. So far as the other charges are concerned, the Court finds that these charges are minor in nature. As the certain irregularities which were noticed are very negligible, the conviction recorded qua the same by the learned trial Judge is required to be upheld.

8. In view of aforesaid observations and discussion, the present appeal is partly allowed. The appellants are acquitted from the grave charge of disposal of food grains i.e. charge of disposal of stock of wheat, rice and sugar to the tune of 325 kgs., 135 kgs. and 6

kgs. respectively. But so far as the other minor charges are concerned, the judgment and order of conviction dated 20th February 1999 passed by the learned Special Judge, Panchmahal at Godhra in Summary Case No.10 of 1998 (ECA) is hereby upheld and the substantive sentence is modified and reduced to the extent of three months. However, the appellants are given benefit of probation under Section 4 of the Probation of Offenders' Act read with Section 361 of the Criminal Procedure Code, 1973. The appellants are directed to execute a bond of good behaviour with one surety of Rs.5,000/- for a period of two years under the scheme of Section 4 of Probation of Offenders Act read with Section 361 of Criminal Procedure Code, 1973. The substantive sentence altered and reduced to three months obviously shall remain under suspension till the period of bond of good behaviour i.e. for two years.

9. The appellants are directed to execute the said bond of good behaviour of Rs.5,000/- with one surety before the trial Court within

period of 15 (fifteen) days from the date of receipt of writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellants so that they may be sent to prison to serve the substantive sentence imposed upon them.

10. It is also ordered that in case of violation of any of the conditions of the bond of good behaviour, the learned trial Court shall be at liberty to issue a non-bailable warrant for arrest of the appellants so that they may be sent to prison to serve the substantive sentence imposed upon them.

11. The Bail Bond executed by the appellants shall stand discharged on the date on which the appellants execute the bond of good behaviour before the learned trial Court. Order and Direction accordingly.

***(C.K. Buch, J)***

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